FOR ARGUMENT

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CASE NO. 83-2166

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PHILIP Q. ZAUDERER
Appellant,

vs

OFFICE OF DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF OHIO,
Appellee,

On Appeal from the Supreme Court of Ohio

BRIEF OF APPELLEE

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ISSUED.

QUESTIONS PRESENTED*

1. May a state, in order to further its substantial state interest in regulating the legal profession and protecting the public, prohibit an attorney from running a newspaper advertisement, irregardless of the accuracy of the statements made therein, which conveys information concerning a particular product alleged to be defective, including medical information concerning which the lawyer may have no expertise, and which solicits persons who may have used the particular product to be represented by the attorney?

2. May a state, in order to further its substantial state interest in regulating the legal profession, and to protect members of the public who are not familiar with contingent fee agreements, (a) prohibit the advertising to the public of offers to represent persons on a contingent fee basis, where the public is not informed to the likely costs and other limitations of the contingent fee agreement, and (b) prohibit as misleading the advertisement of contingent fees in criminal cases where attorneys are not permitted to charge contingent fees in such cases?

3. May a Federal Court, consistent with the Tenth Amendment to the United States Constitution and with considerations of comity, require that a state in a judicial proceeding of that state, give notice of a charged violation other than the facts constituting the violation and the rule violated thereby, or prohibit a state Supreme Court from taking action based upon judicial notice of matters commonly occurring in its courts of inferior jurisdiction?

*There are no parties to this proceeding other than those listed in the caption.

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BRIEF OF APPELLEE

STATEMENT OF THE CASE CLARIFYING APPELLANT'S STATEMENT

Appellant's Statement of Facts, Charges, and Evidence is substantially accurate, though in need of clarification. Appellant was indeed interested for a substantial period of time in running a Dalkon Shield advertisement, contacted Appellee several times concerning it, and had inconclusive meetings concerning it. What Appellant means by the statement "implicit approval of Appellee" to run the ad, however, we can only conjecture, since there is no mechanism by which Appellee can give prior approval for attorney con-

duct—particularly when that conduct is a clear violation of rules having the force of law, and promulgated by the highest court in the State of Ohio.

What Appellant means by the "principal focus" (p. 6) of the complaint and of the hearing can likewise only be conjectured, since the complaint, particularly the amended complaint, involves considerably more than the question of Appellant's Dalkon Shield advertisement as a violation of DR 2-101 (B).

While Appellant's statement—that the Panel initially treated much of Appellant's testimony and exhibits as a proffer—see page 52 of the transcript—is true, Appellant does not point out the testimony and exhibits were not "proffered" before a third party before being provided to the trier of fact, but were presented directly to the trier of fact, treated in Appellant's closing argument as evidence, and have been part of the record as if they had been initially admitted as evidence. While Appellee pointed out (Tr. 67) that it was placed at a disadvantage by such a procedure, Appellee does not believe that the treatment of the evidence as a "proffer" is now a relevant issue, except that it permitted the *de facto* introduction of testimony that was irrelevant to the issue before the Panel. Hearing Panels in the state of Ohio are made up of practicing attorneys, and do not have the authority to declare a rule duly enacted by the State's highest court to be unconstitutional. This is a judicial function which cannot be delegated to nonjudicial officers.

Appellee has never denied the first two statements which Appellant's brief states (at page 10) that he was attempting to prove at the hearing: 1) There were substantial benefits to Appellant's clients, and thus the public, as a result of this advertisement, and 2) Illustrations are a highly useful means of communication and were particularly useful (though they were illegal) here. Nor does Appellee disagree

that there are potential benefits to be gained for many lawyers from increased lawyer advertising. It is just that there are also substantial disadvantages which, given Ohio's interests in protecting its citizens from unwarranted litigation, and providing for the effective regulation of its legal profession, outweigh the potential benefits.

Appellant's statement in his brief (P. 15) that the Dalkon Shield ad was placed "without any intention to violate the Rules" is unrealistic. In his letter of December 1, 1981 (J.A. 43) Respondent stated he had familiarized himself with the Rules and there is no doubt, from his numerous communications with Appellee, that he knew of the rules. The most that Appellant can possibly mean by these statements is that he knew his conduct violated duly promulgated rules, but that he believed the rules to be unconstitutional.

SUMMARY OF ARGUMENT

Appellant has violated duly promulgated state laws which have been enacted for the protection of all citizens. The State of Ohio has a substantial state interest in regulating the legal profession for the benefit of the public and in enforcing rules designed to prevent, inter alia, the bringing of non-meritorious lawsuits against persons who might be sued by lawyers who solicit clients. Incident to that regulation it may impose requirements concerning information to be disclosed regarding contingent fees, and in order to prevent confusion may prohibit the use of most illustrations in advertisements by attorneys. Due process does not require that a person be given notice of the legal theory which underlies a rule. A person, particularly an attorney, who disagrees with a rule should seek a legal determination as to its validity rather than violate the law.

ARGUMENT

I. A LAWYER MAY BE DISCIPLINED FOR THE VIOLATION OF A DULY PROMULGATED RULE, EVEN IF THAT RULE IS ULTIMATELY FOUND TO BE UNCONSTITUTIONAL, WHERE HE KNOWINGLY VIOLATES THAT RULE, WITHOUT TAKING STEPS TO HAVE THE CONSTITUTIONALITY OF THE RULE DETERMINED BY A COURT OF LAW

The proper procedure, especially for a lawyer, where state laws are thought to be unconstitutional by reason of the federal constitution, is to challenge those laws, usually by an action for declaratory judgment, in federal, or sometimes in state, court. It is not to violate the law. *Matter of Felmeister,* 471 A 2d 775 (N.J. 1984). Appellant, a lawyer, chose to violate the law, rather than bringing a challenge in a court proceeding by which its validity could have been determined.

There are many areas of professional conduct subject to regulation that are *malum prohibitum* rather than *malum in se.* These include most rules concerning advertising, solicitation, ownership of practice, law firm structure, and the maintenance of trust accounts. It is not determinative, in considering violations of these rules, that an attorney did not "intend" to do anything that is wrong in itself. Where an attorney knows of the existence of a rule, and takes action which violates that rule, it is the intention to undertake the action which is known to violate the rule that is determinative, and not some other intention to do wrong. There is no doubt that Appellant knew he was violating a rule duly promulgated by the Ohio Supreme Court. He simply thought that it should not be the rule. He may, under the principle announced in *Felmeister,* and irrespective of an

ultimate ruling on the constitutionality of the rule, be disciplined.

II. THE DISCIPLINARY RULES ADOPTED BY THE SUPREME COURT OF OHIO ARE STATE LAW AND ARE ADOPTED OUT OF A NEED TO REGULATE CONDUCT FOR THE PROTECTION OF ALL CITIZENS

The Disciplinary Rules adopted by the Ohio Supreme Court are Rules of general application, are statutory in character, and are adopted out of a need to regulate conduct for the protection of all citizens. *Supreme Court of Virginia vs. Consumers Union,* 446 U.S. 719 (1980), at 731.

In 1969 The American Bar Association promulgated the Code of Professional Responsibility with a preface which contained the following statement:

> The Disciplinary Rules, unlike the ethical considerations are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

The preface to the Code of Professional Responsibility was not adopted by the Ohio Supreme Court when it adopted the remainder of the Code effective October 5, 1970, 23 Ohio St. 2d 1. It was specificially adopted by the Court, however, effective July 15, 1974, at 38 Ohio St. 2d p. xxv. The Disciplinary Rules of the Code of Professional Responsibility thus have the force of law in Ohio and are statutory in character. Since this Court's decision in the *Supreme Court of Virginia* case, *supra,* it is no longer possible to believe that Disciplinary Rules are voluntary codes of conduct to which attorneys may choose to adhere or not.

Attorneys who violate the Disciplinary Rules of the Code, once they have been adopted by state courts, are violating state law, which states have a substantial interest in enforcing, and concerning which states cannot be put to the burden of "proving", in actions brought to enforce those laws, the legislative facts which might establish their constitutionality.

III ALL ADVERTISING IS EITHER IMPLICITLY OR EXPLICITLY, SOLICITATION, AND LAWYERS MUST, IN THE ABSENCE OF A CLEARLY CONTROLLING FEDERAL CONSTITUTIONAL RIGHT TO THE CONTRARY, ABIDE BY THE RULES CONCERNING SUCH MATTERS PROMULGATED BY DULY AUTHORIZED STATE AUTHORITY.

It is not possible to consider attorney advertising as something separate and apart from solicitation. The issue raised by attorney advertising is the extent to which attorneys may, through advertising, solicit clients. The issue is not whether they may solicit, since as one court has said "(A)ll advertising either implicitly or explicitly involves solicitation". *Koffler vs. Joint Bar Association,* 412 N.E. 2d 297 at 931.

The advertisements which this court considered in *In Re RMJ,* 455 US 191 (1982), concern only the more limited type of advertising wherein an attorney advertises information concerning the attorney's personal qualifications and particular areas of law in which the attorney practices. (It also briefly considered the mailing of an office opening announcement but that is not advertising or solicitation as is normally contemplated by the Code of Professional Responsibility, which covers law office announcements in a separate rule (DR 2-102) from that covering solicitation or

advertising.) The information in the *Bates* advertisement was information that may be communicated to the public in general and does not depend for its effect upon its being communicated to any one recipient with a particular legal problem. Neither *R.M.J.* nor *Bates v. State Bar of Arizona,* 433 US 350 (1977), concerned an advertisement which solicited clients to sue an already known defendant for conduct already thought to have occurred, and which conveyed medical information in which lawyers have no expertise.

The particular medium of communication used is not determinative as to whether an advertisement constitutes impermissible solicitation. Modern communications and research techniques have made possible the development of mailing lists which can target particular groups to receive information in different ways. Thus it is possible to target mailings and other communications either directly, or through publications of established circulation, to persons known to have particular interests or needs. There is no longer sufficient meaning to the term "general circulation", as applied to modern communications, to permit that to be used as the relevant standard in determining where advertising crosses over the line of simply informing the public of one's credentials and availability to practice in a particular area of law, to the other side of the line that constitutes soliciting clients to come to the attorney to be represented in a particular matter.

Currently pending before the Board of Commissioners on Grievances and Discipline of the State of Ohio, the Supreme Court of Ohio, or other courts in which Appellee is a party, are cases which involve various means of using communications that could be referred to as "advertising" in one form or another, to solicit clients. These include cases in which it is either alleged or established that attorneys reviewed court dockets to find potential clients who

might reasonably benefit from bankruptcy proceedings, reviewed court dockets to determine potential clients who might need representation concerning the suspension of their driving licenses, and set up corporations purporting to be independent of the attorneys for the purpose of having the clients referred to them, and then solicited clients, usually by direct mail.

These cases by no means exhaust the possibilities by which attorney advertising may be used to solicit clients. Attorneys can contact people personally, have others do so, use mail, hand delivery, telephone, radio, or television. Printed matter can be personally delivered, delivered by others, mailed, or communicated electronically as through cable television or computers. Attorneys can mail printed matter to all homes in an area, particular addreses in which particular people, chosen by preselected criteria, are known to reside, or to particular neighborhoods or cities known to contain a significant concentration of potential clients. Attorneys can deliver or mail letters seeming to be personally addressed, or seeming to be general advertising circulars, to particular occupants using computerized mailing lists. Attorneys can place advertisements directly addressed to particular persons or particular groups of persons thought to be in particular need of legal services in periodicals specifically directed to those kinds of persons, or place advertisements directed to (and even naming) particular persons or groups of persons known to need particular services, in regularly published newspapers (either in the classified section or in other advertisements). Attorneys can place advertisements, in any of these media, inviting people to sue corporations, governments, or other entities known to have a particularly deep pocket and informing readers of the conduct concerning which they wish to sue. Attorneys can use statistical and research techniques, or more prosaically, look at court dockets to determine who is being sued, has

financial difficulties, is threatened with license suspension, or might otherwise be particularly susceptible to a suggestion of a need for legal services.

In none of these instances is the particular medium of communication chosen the determining factor as to whether the attorney has solicited clients. Any time an attorney says anything more than general statements concerning qualifications, kinds of cases handled, and fees and other related general information, and particularly, any time the attorney conveys information concerning a particular course of conduct or product made by a particular manufacturer or potential defendant, he has crossed over the line that is simply advertising which distinguishes one attorney from another attorney (solicitation based upon the attorney's qualifications) and has instead solicited clients for a particular case. If solicitation is permitted (which it is by virtue of advertising being permitted), and unless all solicitation is permitted, there must be some standard to separate permitted solicitation from unpermitted solicitation.

It is clear that in-person solicitation may be prohibited by the State. *Ohralik v. Ohio State Bar Association,* 436 U.S. 447 (1978). It is also clear that solicitation undertaken for political purposes, where there is no opportunity for pecuniary gain by the attorney, may not be prohibited by the state. *In Re Primus,* 436 U.S. 412 (1978). The relevant distinction between these two cases is not whether the solicitation was in-person solicitation (since both were) but whether the solicitation was undertaken for purely political reasons, with no possibility for pecuniary gain on behalf of the attorney. In both cases there was a *possibility* of overreaching, since the lawyer communicated directly with the person sought to be represented.

The standard currently recommended by the American Bar Association for distinguishing permissible solicitation from impermissible solicitation (which Appellant has at-

tached to his Brief at Addendum, page 2) is unreasonable and unenforceable. Appellant has admitted in his testimony in this case that one of his motivations in placing the advertisement was pecuniary and he has been retained by a substantial number of clients as a result. "Pecuniary motivation", however, certainly with respect to any attorney in private practice, is an impossible standard to apply in solicitation cases. It is impossible to distinguish pecuniary motivation from nonpecuniary motivation in any situation in which an attorney personally receives some compensation for representing a party, and any standard such as "significant motive" for "pecuniary gain" is not only unrealistic, but flies directly in the face of this Court's reasoning in "commercial speech" cases, which imply that it is precisely that pecuniary motivation that is being protected.

More importantly for this case however, the standard concerning advertising/solicitation that is now recommended by the American Bar Association is not the law in Ohio. That standard is contained in a set of Model Rules promulgated by the American Bar Association which has, as of this writing, been adopted in only two states, and even then, only with major and inconsistent (as between the two states) changes in some of the most important rules contained in that Code. The rule regulating solicitation contained in that Code is not, in fact, the one that was recommended, for several years, by the Committee that developed that code, but was, rather, inserted at the last moment, apparently with very little thought. In any event, since it so clearly disregards this court's reasoning in commercial speech cases by making pecuniary gain the determining standard in solicitation cases, there is no reason for this Court, or the State of Ohio, to expect it to become an acceptable and enforceable standard, or to make any decision on the assumption that it will be.

The State of Ohio's rules regarding advertising and solici-

tation are not unreasonable or unusual rules. Ohio's advertising rule, by the testimony of Appellant's expert witness (Tr. p. 110, 113) follows the approach taken in a majority of states. The State of Ohio's determination to enforce rules which are basically similar to the rules in a majority of other states is not unreasonable.

IV THERE ARE SUBSTANTIAL STATE AND COMMUNITY INTERESTS FURTHERED BY RULES PROHIBITING SOLICITATION BY ATTORNEYS THAT ARE NOT PROTECTED BY A PROHIBITION LIMITED TO "FALSE AND MISLEADING" COMMUNICATIONS

The standard of "false and misleading" is not a sufficient regulatory standard for attorney advertising/solicitation. The legal profession is not comparable to the drug industry, the medical profession, nor the gas and electric industry involved in *Central Hudson Gas and Electric Corporation v. Public Service Commission,* 447 U.S. 557 (1980). As this court stated in *RMJ* (455 US at 203):

> (T)he Central Hudson formulation must be applied to advertising for professional services with the understanding that the special characteristics of such services affect opportunities to mislead and confuse that are not present when standardized products or services are offered to the public.

Thus this court has recognized that it is legitimate, in the regulation of attorney advertising/solicitation, to consider whether the advertisement is not just false or misleading, but confusing. The communication of information that is confusing can be just as much a danger to the public as the communication of information that is false and misleading.

In neither event can the recipient of the information act upon the information to protect his or her own interests. The State of Ohio thus may, in promulgating rules for the regulation of the bar, consider whether the particular advertisements (such as advertisements offering to represent clients for contingent fees) provide sufficient information to permit potential clients to make rational, informed decisions.

The *Central Hudson* test cannot be applied to the legal profession without taking into account the way the legal profession differs from, not just other advertisers, but other professions. The testing of drugs is subject to rigorous scientific scrutiny by which standards can be developed to determine if statements concerning those drugs can reasonably be considered to be false, misleading, or confusing. Statements of law and of legal facts relevant to legal issues, on the other hand, are almost always debatable, and cannot, like most statements concerning drugs, be verified or disproven, within tolerable limits, in a laboratory.

Nor is the legal profession akin to a public utility providing gas and electricity. When applying the tests of *Central Hudson* to determine whether a regulatory standard is more extensive than necessary to accomplish objectives, one cannot operate on the assumption that lawyers are part of a great social laboratory in which it is possible to conduct experiments that will provide evidence of how one might follow a "less restrictive path". "The professional disciplinary system would be in utter chaos if violations could be defended on the ground the lawyer could think of a better rule." *Committee on Professional Ethics v. Humphrey*, 355 NW 2d 565 (Iowa, 1984) at 569.

Nor can the legal profession be reasonably compared to the medical profession in determining the extent to which attorneys should be permitted to solicit through advertising. Doctors have particular patients whose health is at

stake. One may reasonably argue that a doctor owes paramount duty to the patient to save the patient's life, especially inasmuch as there will not be normally a threat to the life of other patients. Attorneys who are soliciting clients are not in the same situation. Attorneys operate in an adversary system where there will be an opposing party who will be sued if an attorney solicits a client to bring suit. Rules prohibiting solicitation protect third parties, some of whom are innocent and some of whom are not, from lawsuits that an attorney may have a substantial pecuniary interest in bringing.

If rules regarding solicitation through advertising protect, inter alia, those who might be otherwise unjustly sued by clients so solicited, the State of Ohio should not be compelled to experiment with its citizens' reasonable expectations that attorneys will not stir up litigation against them in order to provide "evidence" that its rules for regulating the legal profession are constitutional.

In the instant case Appellant was very much aware of both the particular company which was to be sued and the particular conduct with respect to which he wanted to sue that company. Neither the Appellee nor the Supreme Court of Ohio have attempted to justify that company's conduct or to suggest that company did not deserve to be in litigation for the conduct in which it engaged. The Stipulations, quite to the contrary, make absolutely clear that none of the parties in this action had any interest or desire to defend or justify the actions of the company.

The problem with Appellant's conduct in soliciting clients to sue this particular defendant, however, is that not all defendants and potential defendants will have engaged in conduct such as that engaged by the company. Some attorneys may wish to solicit clients for the purpose of suing the government for its role in the production and utilization of Agent Orange, for the purpose of suing manufacturers

for damage that has been caused as a result of asbestos, or for the purpose of suing operators of coal mines or other companies that allow dangerous or unsafe conditions to exist in the workplace. Others may wish to sue companies who have dumped toxic wastes, the owners of land upon which toxic waste is located, or perhaps the government agency given by statute the responsibility of providing for the cleaning up of those toxic wastes. In all of these situations there may be some valid social reason to want to encourage the solicitation of clients for the purpose of bringing suits against these particular defendants. Not all defendants or potential defendants, however, are the manufacturers or users of dangerous products, the maintainers of toxic waste dumps, or profiteers maintaining unsafe conditions at the cost of their employees' health.

Attorneys could also, if they may, under the rationale of a general constitutional right to solicit clients for the reasons of commercial speech, solicit clients for the purpose of bringing suit against their next door neighbor for letting water run off into their yard, for the purpose of suing one's partner in business, for the purpose of suing a spouse for divorce or to obtain child custody, for the purpose of suing one's employer for violations of civil rights, for the purpose of suing the local school administrators because many of the students who are being graduated from the schools are incapable of reading or writing according to minimally acceptable standards, or for the purpose of suing newspapers or reporters because they have made statements which appear to be libelous. Not all of these claims would be meritorious, but if there is a factual basis and applicable law that is reasonably debatable, then prohibitory standards such as false, fraudulent, or misleading (or even confusing) would be insufficient to prevent abuse of the process by lawyers who stand to make a profit by it. Given the diversity, size, and economics of the modern legal profession

(there are now, by most estimates, over 700,000 lawyers in the country, 27,000 of them in Ohio) it is no longer reasonable to assume that all attorneys will voluntarily refrain from solicitation that goes too far.

If the solicitation of clients through advertising is going to be permitted in case of a large company that has almost certainly done substantial damage to the clients being solicited, then neither a proscription against in-person solicitation, nor a requirement that the solicitation be limited to publications of general circulation, will protect those other parties, some of whom will be guilty or some of whom will be innocent, against whom attorneys will have a financial incentive to bring suit.

There is no enforceable legal standard that can be set up to provide that attorneys may solicit clients to sue only the guilty but not the innocent. Unless there is some rational, principled basis, consistent with the federal constitution, for drawing appropriate distinctions between suits that a reasonable public policy would wish to encourage by permitting solicitation, and suits which a reasonable public policy ought to discourage by prohibiting solicitation, then this Court should hold that state regulations prohibiting solicitation, at least as applied to solicitation to sue a particular defendant for conduct already thought to have occurred, whether undertaken by advertisements in newspapers of general circulation or otherwise, are rational and ought to be upheld.

V THE STATE OF OHIO HAS A SUBSTANTIAL STATE INTEREST IN ITS SYSTEM OF PROFESSIONAL REGULATION OF ATTORNEYS AND MUST TAKE INTO ACCOUNT THE REASONABLE EXPECTATIONS OF BOTH ATTORNEYS AND THE PUBLIC IN PROMULGATING RULES INCIDENT TO THAT REGULATION

The State of Ohio has substantial and compelling state interest in regulating its legal profession so as to protect its citizens from unwarranted and excessive litigation. In order to accomplish this it is dependent upon the cooperation of numerous attorneys, both to report and gather information concerning attorney misconduct and to assist in the operation of its regulatory system for attorneys.

Neither the State of Ohio, nor any other state, has a system of professional regulation that is independent of the cooperation of the attorneys who are being regulated. In all states, whether its disciplinary apparatus is operated entirely by a professional staff or not, the disciplinary system is, by virtue of DR 1-103 (A) and (B) of the Code of Professional Responsibility, dependent upon information received from attorneys practicing in the state. Ohio's system of professional regulation is more dependent upon the effective cooperation of private attorneys than other state systems that rely entirely upon professional staffs for legal discipline. In Ohio complaints concerning professional misconduct may be initiated by local bar association members who must, upon the filing of the complaint, swear that they will be responsible for the prosecution of the action. The jurisdiction of these bar associations, except for advertising matters, is concurrent with the Disciplinary Counsel.

Ohio's Board of Commissioners is composed of seventeen (17) attorneys, only nominally compensated for their work, from different areas of the state and with different backgrounds and practices. It is, in theory, the entity involved in Ohio's legal disciplinary process that is most representative of the interests of the legal profession in the state. The members of that Board recommended that Appellant be indefinitely suspended from the practice of law.

The Ohio Supreme Court, in reviewing the matter, determined that the penalty recommended by the Board was too harsh given the lack of consensus and uncertainty concern-

ing standards of attorney advertising and solicitation at the national level. Nonetheless the Ohio Supreme Court did impose the minimum disciplinary sanction. Unless the State of Ohio, after having adopted rules recommended by professional organizations purporting to represent the interests of the legal profession and the public, should ignore clear violations of those rules, then the actions of the Ohio Supreme Court in imposing discipline, but reducing it to the minimum discipline allowable by law, was rational, and ought to be upheld.

Moreover, the Ohio Supreme Court specifically reviewed the question of the constitutionality of its Disciplinary Rules and found them to be constitutional. It said (*Disciplinary Counsel v. Zauderer,* 10 Ohio St. 3d 44 [1984] at 47):

> "These sections which the panel and board found had been violated by the respondent are constitutional provisions of the Ohio Disciplinary Rules as contained within the Code of Professional Responsibility."

If for any reason the Appellant has engaged in *any* conduct which is improper and for which he can be disciplined, the discipline imposed by the Ohio Supreme Court should be allowed to stand, even if one or all of the Disciplinary Rules he was found to have violated might be over-broad if applied to other persons in different circumstances. *Bates v. State of Arizona,* 433 U.S. 350 (1977), at 381.

The Ohio Supreme Court has imposed the minimum discipline which can be imposed on an attorney for professional misconduct. Thus if it was improper for Respondent to advertise for a contingent fee in a criminal case, *or* if it was improper for Respondent to advertise the availability of a contingent fee without including qualifications for other expenses which might be incurred by a client, *or* if it was

improper for Respondent to solicit through newspaper advertisements persons unknown to him to sue a particular defendant who was known to him for a particular conduct which was known to him, *or* if it was improper for Respondent to place an advertisement which he did place in clear violation of the Disciplinary Rule governing advertising by attorneys in Ohio, the discipline imposed by the Ohio Supreme Court should stand. Only if the Respondent could not have been disciplined for *any* of the violations for which he has been disciplined should this Court order that his discipline be reversed.

VI THE COMMUNICATION OF INFORMATION CONCERNING CONTINGENT FEES MAY BE REGULATED BY THE STATE IN THE INTEREST OF ENSURING THAT CONSUMERS OF LEGAL SERVICES RECEIVE ACCURATE INFORMATION

Contingent fees are subject to abuse, since there may be no relationship between the amount of a fee paid and work performed. Nonetheless they are justified and necessary in the public interest in order to make possible the bringing of meritorious cases for which some clients might not otherwise have access to the courts. Contingent fees however, do not always serve the best interests of potential clients, and attorneys may be required to provide certain information concerning those contingent fees in order to protect the interests of potential clients and encourage informed decision-making concerning attorneys' services.

There is a public interest in ensuring that the public be adequately informed of the realities of contingent fee contracts. Members of the public cannot be presumed to know what is meant by "contingent fee." Most people would not know, for example, that under most contingent fee arrangements there can be substantial expenses incurred by the client. Any statement such as "if there is no recovery no legal fees" or "full legal fee refunded if convicted", the State of Ohio can rationally conclude, are misleading unless the essential terms of the agreement are conveyed to the public. It is not necessary to conclude by this that lawyers must specify in detail the terms and costs involved. At a minimum, however, the state may require that (1) potential clients not be left to believe that there are *no* costs involved if the client loses the case, and (2) attorneys not advertise that they are available to take criminal cases on a contingent fee basis when they may not legally do so.

Appellant's statement (at Brief, P. 41) that Ohio could, and possibly should, require that all contingent fee contracts be in writing and contain the information necessary to permit clients to make informed decisions is not a statement with which Appellee disagrees. The problem with the statement, however, is that it is not the law in Ohio, however desirable it might be, and attorneys have an obligation to abide by those rules that *are* law, not the ones they would prefer be the law.

Ohio's DR 2-101 (B) (15) requires that attorneys may advertise "contingent fee rates subject to DR 2-106 (C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses". The Ohio Supreme Court found that Appellant had violated this rule "by failing fully to disclose the terms of the contingent fee arrangement". Court costs and expenses, in complex medical litigation, could easily exceed two-thirds the costs of a recovery. It is possible, therefore, that a client could be entering into a contract in which expenses and lawyers' fees consume the entire recovery. Surely the state may require that potential clients be given this information. That the state may and probably should require more does not excuse Appellant's failure to provide

even this basic minimum of information.

VII THE USE OF ILLUSTRATIONS IN ATTORNEY ADVERTISING MAY RATIONALLY BE PROHIBITED BY THE STATE ON GROUNDS, SUCH AS CONFUSION, OTHER THAN THAT THEY ARE FALSE OR MISLEADING

The State of Ohio may rationally prohibit the use of illustrations other than the scales of justice or the attorney's picture. While the state may not do so on the grounds that all such illustrations are inherently misleading (as Appellant mistakenly states the State of Ohio has done), the state may rationally conclude that illustrations in attorney advertising are so inherently subject to abuse and manipulation through emotional or subconscious appeals as to be incapable of effective regulation through rational legal process. Appellant seems to be unable to accept the fact (at Brief, P. 34) that it is possible to use and abuse illustrations in advertising in such a way that they are not false and inherently misleading—as when advertisements are used to simply confuse, divert attention from important issues, or appeal to emotion or prejudice.

There is no doubt that a portrayal of the scales of justice, and a picture of a lawyer, do not convey much information to the public. But the purpose of most illustrations in advertising, as Appellant points out, is to get attention, not to convey information. The State of Ohio obviously has no compelling state interest in permitting attorneys to use the scales of justice, and pictures of themselves, in advertising. But the State of Ohio does not require that they do so, and so Ohio's exception of these two illustrations to its ban on illustrations is not relevant to Appellant's case.

The State of Ohio does not deny, and has never denied, that illustrations are useful in attracting attention to adver-

tisements. Nonetheless, Respondent introduced into evidence (proffered) at the hearing, over the objections of Relator, certain advertisements (JA 45, 46, 47, 48, 49, 50, and 51) placed by the Ohio State Bar Association. The Appellant has now designated them as Exhibits to be attached to the Joint Appendix in this case.

The Ohio State Bar Association was not, by those advertisements, soliciting clients—it was purporting to be acting for the interest of Ohio attorneys as a group. It could accept no employment as a result of these ads. As a private voluntary organization it had a perfect right to run these ads. It is not involved in the process of professional regulation of attorneys in Ohio (though local certified—usually county—bar associations are), and these ads should not have been viewed as either an implicit or explicit recommendation that individual attorneys should or may use similar ads.

Nonetheless, since Appellant has insisted that those advertisements are relevant, not only to the determination made by the Panel that Appellant's advertisement/solicitation violated Ohio's disciplinary rules, but to this Court's determination as to the constitutionality of Ohio's rules concerning advertising and solicitation, it is necessary to consider them in some detail.

The advertisements contained, by Appellants' designation, in the joint appendix do not indicate that such advertising ought to be permitted to individual lawyers, or that illustrations ought to be permitted in order to attract attention to advertisements. They merely indicate that illustrations do indeed attract attention, which no one has disputed.

A careful analysis of the advertisements, in fact, would more likely lead to the conclusion that the illustrations in the ads are precisely the part of them that is most objectionable. The first advertisement (J.A. 45) attracts our attention with a picture of a forlorn middle class gentleman who

is in jail. The limerick rhyme next to it tells us why: he ran a red light and was thrown in jail after entering a "no contest" plea. The number of middle class gentlemen who run red lights and are sentenced to jail for that offense is, in all probability, insignificant. Nonetheless, the predominant impression left by the ad is that, merely for running a red light you can easily wind up in jail, so you had better contact a lawyer. The impression created in the public's mind by the advertisement is one of unreasonable, perhaps unfair, judicial and police administration, from which one one's lawyer can save a person. The advertisement does convey (though not in the illustration or limerick) useful information. But both the illustration and the limerick, in order to attract attention and introduce humor into an (artificially created) fearful situation, create false impressions as to the likelihood of the supposed harm befalling the reader.

The advertisements at J.A. 50 and 51 use the same psychology of creating a fear in the reader, using humor to induce a sense of release of tension in the face of that fear, and suggesting that lawyers (some of whose association has sponsored the ad and thus induced this sense of relief in the presence of the fearful situation) can solve the problem for the reader. The advertisement at J.A. 50 shows a picture of the Leaning Tower of Pisa and suggests that a carefully drawn purchase agreement can protect the reader from latent (often undiscoverable) defects. But as most attorneys who have drafted such agreements know, this is precisely the area of law against which most real estate agreements do *not* provide protection.

The advertisement at J.A. 51 has a picture of a rather stern looking gentleman in glasses. Under the picture it states that "If you don't have a will, guess who could wind up with the kids. Uncle Harry." Uncle Harry, in this picture, is rather obviously intended to be someone who the

reader of the advertisement would not want to wind up with the kids.

All of these advertisements are relatively benign and show a sense of humor. Nonetheless, they appeal to the readers of the advertisement by playing upon fears which are communicated through pictures, but not articulated through rational mental processes.

These advertisements work on different psychological levels. The picture of the Leaning Tower plays on the fear of purchasers of real property that there may be hidden structural defects in the property. The advertisement concerning Uncle Harry appeals to the fear in parents that their children may, after they are dead, be brought up by persons who will not love and care for the children. Anyone with any experience in Probate Court knows that the chances of Uncle Harry ending up with the children are remote. Nonetheless the literal statement in the advertisement is accurate: Uncle Harry *could* end up with the kids. Thus the maker of the ad is able to say something that is literally true, but to use the picture to convey a misleading impression. The function of the illustration in the advertisement is to mislead, but to do it in such a way that it cannot be proven that anyone intended to mislead. The "Uncle Harry" ad won an award from the Midwest Region of the American Federation of Advertising because it did well what advertisers want to do: convey messages, without words, using images that appeal directly to the emotions, and bypass rational thought processes. Create a need, or fear, then suggest to the reader that the sponsor is able to fulfill or alleviate that need or fear.

These advertisements appeal to normal human fears to encourage the reader of the advertisement to believe that attorneys can solve the problems created by whatever it is (death and the prospect of one's children being left alone, latent defects in housing, unreasonable police or court ad-

ministration for minor traffic violations) that brings on these fears. Most of the fears to which these advertisements pander, however, are fears which exist in the normal course of everyday living and which cannot be removed, or to a large extent resolved, by attorneys. Most drivers are not going to be put in jail for running a red light, but the advertising concerning Fred perpetuates the fear that they may be. These advertisements are, in the subconscious appeals they make, misleading in some instances, and confusing in others, but since they do not purport to say anything serious, cannot be easily proven to be.

The fact that these advertisements are put out by a bar association is no reason for members of the legal profession to emulate or admire them. They do make it clear, however, that the use of illustrations in advertisements, by attorneys or by others, could not be limited or controlled for reasonable purposes. If attorneys may use the more sophisticated, and relatively benign, illustrations contained in these advertisements, it will be very difficult to prohibit the use of more direct and emotionally compelling images in attorney advertising. What, for example, will prohibit an attorney from publishing a picture of a grisly automobile accident and suggesting that either the manufacturer of the automobile or the party driving one of the vehicles might be sued? What will prohibit an attorney from publishing a picture of a doctor holding a human heart and saying: "Oops, I thought it was a kidney?", and inviting the reader to sue someone for malpractice?

At some point in the conveyance in such messages, it becomes irrelevant to consider whether the message being conveyed is false or misleading. If the message being conveyed is so overwhelming, or appeals so subtly to fears, biases or prejudices as to interfere with the normal processes and methods of communication for assimilating and acting rationally upon information, the state may conclude

that such information may be prohibited *in communications by lawyers designed to attract clients,* particularly where those communications are designed to encourage the reader of the message to bring suit against other parties.

The prohibition of most illustrations in attorney advertising/solicitation is not the same as prohibiting the use of such images in all communications to the public in general, nor the same as prohibiting the use of such images by lawyers where lawyers communicate the messages for purposes other than being hired by clients. Because of the nature of the legal profession, and because advertisements by members of the profession attract not only clients *for* whom the attorney is acting, but often result in a case *against* someone on the other side, the use of images that can be used to create or play upon fears may be prohibited.

The use of visual, non-verbal images in attorney advertising is validly restricted in other states because of the potential subliminal impact on the audience: *Matter of Felmeister,* 471 A 2d 775 (N.J. 1984), *Committee on Professional Ethics and Conduct v. Humphrey,* 355 N.W. 2d 565 (Iowa 1984). In *Felmeister* (at page 780), the court stated, with respect to broadcast advertising:

> Advertisers expect to achieve maximum persuasive effects from a fleeting exposure of the message sometimes with a potential subliminal impact on the audience. In radio and television broadcasting the volume, quality and intonation of voices can create ambiguities or convey nuances in meaning. Music, sound effects and dramatization are additional broadcasting techniques that may color the message to the listeners. These radio and television advertising variables, which convey subtle messages of their own, are difficult to monitor or even measure.

Any of several other standards that might be used to judge visual images that could be conveyed in advertising, such as whether the advertisement is dignified, tasteful, or as applied to illustrations or pictures, whether it is truthful or accurate, are inherently subjective and incapable of objective resolution through legal process. The State of Ohio prohibits the use of most illustrations in attorney advertising not because they are inherently misleading but because they can be so easily used to appeal to unconscious or subliminal fears and apprehensions in the public as to be incapable of effective regulation. Because of the unique nature of legal advertising as a communication that both attracts clients and encourages suits against other persons, the State of Ohio may rationally prohibit the use of illustrations.

Because Appellant's advertisement concerning the Dalkon Shield may have used its particular illustration to attract attention in a way that is more directly related to the information sought to be conveyed in the advertisement than does the Ohio State Bar Association advertisements, this does not justify Appellant's advertisement. That Appellant's advertisement is only a minor violation of a rule designed to prevent major abuses does not make it less a violation. It simply makes it a less compelling example than the Ohio State Bar Association advertisements of why the State of Ohio should have such a rule.

VIII WHERE A PERSON IS GIVEN NOTICE OF A RULE AND CONDUCT WHICH IS ALLEGED TO VIOLATE THAT RULE, THERE IS NO VIOLATION OF DUE PROCESS MERELY BECAUSE THE LEGAL THEORY UPON WHICH THE RULE IS BASED IS INCONSISTENT OR CHANGES

Appellant's argument concerning the drunk driving ad and Due Process ought to be rejected. Appellant's due process rights were not violated since he was given notice of a) the rule violated, and b) the facts (the placing of the advertising) which violated the rule. Due Process does not require a consistent theory as to *why* conduct violates a law —it requires only that a person be given notice of the facts constituting the violation and the law those facts are alleged to have violated. The due process violation in *In Re Ruffalo*, 390 US 544 (1968) was that the Board added another *count* after Respondent's testimony. Here, not only the counts, but the rules and applicable facts, have remained the same from the beginning of the hearing until now.

Trial courts of law are not college debating societies, nor are they forums for debating the legislative facts, or the rational bases, that underlie the enactment of a law. A person may be convicted of a speeding violation irrespective of whether the purpose of the law is to save lives or to conserve gasoline. A person charged with violating a law may make a record concerning constitutional *arguments* (which is different from evidence) in the trial court, and may make arguments concerning the constitutionality of applicable law in appellate courts, as Appellant is now doing. All due process requires is that he be given the opportunity to do so. In this instance Appellant was not only afforded that opportunity, but actually presented evidence, and argued about that evidence, to the trier of fact.

Appellant is correct in stating that the Appellee urged a different theory upon the Board of Commissioners than that used by the Board as to why Appellant's conduct in placing the drunk driving ad was deceptive. Appellee pointed out that DR 2-106 (C) prohibited contingent fees in a criminal case, and thus it was misleading to advertise to the public that Appellant was available to represent clients in criminal cases on a contingency basis. And Appellant is

correct in pointing out that the Board of Commissioners chose to proceed on a different theory—that is, that the advertisement was misleading because of the common practice of pleading to lesser charges.

But the Board of Commissioners does not, in Ohio's system of attorney grievance and discipline, impose discipline. It only recommends it. (Gov. Bar Rule V [2], and [15], Appendix A-4, A-16, Appellee Brief in Opposition to Jurisdiction.) The recommendation is filed with the Supreme Court (Gov. Bar Rule 16), a show cause order is issued (Gov. Bar Rule 17) and the Court reviews the matter (Gov. Bar Rule 20), and may impose discipline. These proceedings are *sui generis*, stemming from the inherent powers of the court to regulate the practice of law, *Ohio State Bar Association v. Weaver*, 41 Ohio St. 2d 97 (1976). Only the Ohio Supreme Court may impose discipline in Ohio.

The Supreme Court of Ohio has original jurisdiction in attorney disciplinary matters. (Appendix A-1, Appellee's Brief in Opposition to Jurisdiction.) Ohio Rule of Evidence 201 on Judicial Notice (A-30, Appellee's Brief in Opposition to Jurisdiction) provides that a "court may take judicial notice, whether requested or not". Appellee could not reasonably expect attorneys and judges in the State of Ohio not to know that drunk driving charges have frequently been subject to plea bargaining. Respondent's objection, then, is not to the fact of which judicial notice was taken, which is indisputable, but to the fact that the Board introduced this seemingly unrelated fact at the last moment in order to justify a finding of a violation of a rule.

But it is not the function of the Board of Commissioners to state why conduct found to have violated a clearly promulgated disciplinary rule is improper. It is its function to review the conduct and make an appropriate recommendation. The Ohio Supreme Court did, upon review of the matter, accept the Board's findings as to the Dalkon Shield

advertisements. (10 Ohio St. 3d at 47.) As to the drunk driving ad, while it repeated the Board's reasoning, it stated only that it agreed with the Board's conclusion that the ad was "misleading and deceptive" (10 Ohio St. 3d at 48), language which could incorporate either the Board's or Appellee's rationale as to why the rule violated DR 2-101 (A). Appellee, naturally, would prefer that the Court have clearly accepted its reasoning, but that is not the issue before this court. The issue is not whether the Court's action was wise, well articulated or instructive, but whether it was constitutional. If, by either rationale, the Supreme Court of Ohio could conclude that Appellant engaged in conduct (placing the advertisements) which violated its disciplinary rule 2-101 (A), then there was no deprivation of Appellant's rights to due process.

Moreover, it further appears from a review of the Ohio Supreme Court's opinion that it did not, as a result of its conclusion that the drunk driving ad violated DR 2-101 (A), impose any more discipline on Appellant than it would have in any event. The Court specifically noted, in fact, that Appellant had voluntarily withdrawn the advertisement and did not accept clients as a result, and stated that it would accordingly only impose a public reprimand.

In summary, Appellant was given notice of a rule he was alleged to have violated, and the facts constituting this violation. His objection that this violated his rights to due process thus is simply a restatement of his argument that he should be permitted to challenge the constitutionality of duly enacted law by introducing evidence tending to show facts that would bear upon the enactment of what he believes would be a better law. His objection, again, is simply that he does not like the law and believes he should be able to prove it is unconstitutional in whatever forum he chooses.

IX APPELLANT COULD AND SHOULD HAVE SOUGHT A LEGAL DETERMINATION AS TO DISCIPLINARY RULES HE BELIEVED TO BE UNCONSTITUTIONAL RATHER THAN VIOLATE THOSE RULES

Appellant seems intent—by his argument concerning a due process right to be notified of a particular legal *theory* and by his suggestion that *in a proceeding in which he is charged with violating a law* he has a right to introduce evidence concerning the "legislative facts" which might bear upon the wisdom of the law (as contrasted with a right to enter constitutionally based objections, on the record, so that he might later, as here, appeal the question of the law's constitutionality)—upon establishing the principle that the law governing attorneys is somehow not the law and that he can, if he disagrees with a law, violate that law.

This is tantamount to arguing that because he is an attorney, and might be able to think of a better law, he is thus somehow exempt from the law and ought not be punished for its violation. This would be an extreme argument even in those moral traditions that recognize a right to conscientious objection or civil disobedience, where it is generally acknowledged that though one may violate a law thought to be *unjust* (and not merely stupid or petty), one must be prepared to undergo punishment by civil authorities for having done so.

Lawyers, however, have a higher and special, not a lesser, duty to uphold the integrity of the law, and this Court should not accept the validity of Appellant's reasoning. Both the New Jersey Court in *Felmeister, supra,* and the Iowa court in *Humphrey, supra,* properly expressed alarm at this kind of reasoning, which, the Iowa court correctly pointed out (at page 569), would reduce the disciplinary system to "utter chaos".

It is clear, under the abstention doctrine enunciated in *Younger v. Harris,* 401 U.S. 37 (1971) and *Middlesex County Ethics Committee v. Garden State Bar Association,* 457 U.S. 423 (1982) that federal courts will not intervene (absent other factors) in ongoing state judicial proceedings to rule upon constitutionality of a law being enforced in these proceedings. Nonetheless it also seems clear, under the principles enunciated in *District of Columbia Court of Appeals v. Feldman,* 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983) and *Zimmerman v. Grievance Committee of Fifth Judicial District,* 726 F 2d 85 (1984) that Federal courts will entertain challenges to rules for the regulation of the bar promulgated by state courts in non-judicial proceedings (as contrasted with challenges to state court decisions in ongoing judicial proceedings).

Thus the federal court in *Durham v. Brock,* 498 F Supp. 215 (1980), in an action seeking declaratory and injunctive relief, found a provision of the Tennessee Supreme Court which prohibited an attorney from advertising areas of practice to be unconstitutional. And thus a federal district court in *Spencer v. Justices of the Pennsylvania Supreme Court,* 579 F. Supp. 880 (1984) took jurisdiction to rule that some provisions of Pennsylvania's Code of Professional Responsibility concerning advertising and solitication were valid, and others were not.

Appellant in this case could have, in other words, gone into federal court to challenge the validity of the rule with which he disagreed, instead of choosing to violate the rule. Having a perfectly adequate remedy through which to determine whether the rule was constitutional, Appellant nonetheless chose to forego that proceeding and to violate the law. He now comes to this court, having been reprimanded for conduct that is clearly a violation of the Ohio Supreme Court's Code of Professional Responsibility, and asks that this court find that the federal constitution re-

quires that an attorney be permitted, *inter alia,* to use illustrations in advertisements soliciting clients, accept remunerative employment after soliciting clients to sue a particular defendant for conduct thought to have occurred, advertise that he will represent clients in both criminal and civil cases on a contingent fee basis without disclosing any of the details of the contract, and place advertisements containing information which clearly violates disciplinary rules duly promulgated by a state agency clearly authorized to promulgate such regulations.

It is not determinative, in deciding whether a rule violates the federal constitution, that it is questionable, unwise, badly drafted, inane, or brilliant, or whether there are several other rules which could be thought up by attorneys and which might, from one point of view or another, be better. We would hope, as attorneys, that the rules which are adopted for the governance of the legal profession would be wise, but the process by which they are generally drafted and adopted does not lend itself to that. Wise or not, however, where they are clearly the law, attorneys have an obligation to abide by them.

The Tenth Amendment to the U.S. Constitution provides that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States or the people. Under this amendment, and principles of comity regarding state court decisions and state laws, federal courts should defer to state court decisions unless those decisions violate some clear federal constitutional right, or federal law in an area which the federal government has preempted. The federal government has not preempted the area of professional regulation of attorneys, and the responsibility for such regulation has fallen upon state courts. Given the increasing size, diversity, and litigousness of that profession, the task of professional regulation is one that can be extremely burdensome, and no

decisions which state courts make are likely to please everyone. Given the structure of professional regulation in this country, then, it is especially important that federal courts defer to state court decisions unless they conflict with some clearly articulated federal constitutional right.

CONCLUSION

While there is a federal constitutional right in commercial speech to advertise the qualifications of a lawyer and availability to practice in particular areas of law, there is not, from a review of this Court's decisions, any federal constitutional right to solicit clients to sue particular persons or entities (unless done under the auspices of a political organization as in *Primus*) and thus foment litigation that otherwise might not have occurred. The State of Ohio's disciplinary rules specifically forbid such conduct, and do not do so irrationally. While they could be overbroad as applied to other possible conduct by other attorneys, the State of Ohio could constitutionally discipline Appellant for the conduct in which he engaged. Appellant has been given the minimum discipline he can be given for a disciplinary violation. Accordingly, the discipline ordered by the Ohio Supreme Court should stand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief have been served upon the Appellant's Counsel, Alan Morrison, Public Citizen Litigation Group, Suite 700, 2000 P Street, N.W., Washington, D.C., 20036, by United States mail, first class postage prepaid, on this ____ day of December, 1984. I further certify that all parties to be served have seen served.

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